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IN THE

Supreme Court of the United States

October Term, 1943

No. 399

TRIANGLE CONDUIT & CABLE CO., INC.,
Petitioner,

vs.

NATIONAL ELECTRIC PRODUCTS CORPORATION,
Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

FLOYD H. CREWS,
Of Counsel.

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The burden of the petition is not abstract, as stated by respondent's brief in opposition, but is concrete. It is directed against *respondent's* actions in this case. The petition is based upon the fact that a patent owner—*respondent* —has *in this case* harassed an honest manufacturer—petitioner—by misuse of its worthless patents as instruments of business aggression through abuse of legal processes, to coerce petitioner's two largest customers into dealing with respondent to the exclusion of petitioner.

The hollow mockery of respondent's pious pretention is nowhere more manifest than in its statement on page 5 of its brief that:

> "It seems to us therefore that the most important thing in this whole situation is to bring an end to interlocutory proceedings and to proceed to trial."

If there had been any sincerity in respondent's desire to obtain adjudication of the validity of its patents and the charge of infringement thereof by petitioner's products, it would have heeded the compulsion of Rule 13(a) of the Rules of Civil Procedure, and in *prompt* response to the declaratory judgment complaint filed by petitioner in this cause on January 16, 1941, counterclaimed for infringement of its patents. Thereby, had respondent *really* wanted it, there would have been obtained a trial and adjudication nearly three years ago. Instead, respondent has prolonged this litigation through extensive and unwarranted interlocutory proceedings, both here and in Michigan, in order to hold its continuing threat over petitioner's customer, Sears. No business relations can withstand forever an unadjudicated charge of illegality; constant dripping wears away the hardest stone. And yet, in its brief, respondent has the temerity to represent its successful efforts to *delay* the trial of this cause as beneficial to Sears! And to petitioner!! And infers that petitioner is responsible for the delay!!!

Respondent's assertions that it has not harassed petitioner or threatened petitioner's customers are hypocritical, to say the least. It supports these assertions with quotation from the earlier District Court opinion *which was reversed,* undoubtedly because of the flatly erroneous statement of the District Court that "Defendant has made no threats. There is no evidence of harassment." As was shown on the face of the record before the Court of Appeals, respondent not only actually made threats against petitioner's two largest customers—Sears and M. B. Austin —respondent thereafter actually attempted, *by personal solicitation by its patent counsel,* to induce Sears to cease being a customer of petitioner and switch its business to respondent. Sears' attorney, Mr. Frank Marks, wrote:

> "You may be interested to know that Mr. Hoxie of Pennie, Davis, Marvin & Edmonds, personally called on the writer a week or so ago. He mentioned the Triangle Conduit & Cable suit and stated that, nevertheless, his client would probably file suit against Sears, Roebuck & Co. He inquired as to whether or not Sears would make a definite decision in the matter, *and I received the impression that the purpose of his visit was to influence Sears either to obtain a license or to modify its dealings with your client.*" * (Emphasis ours.)

It is true, as respondent asserts (Brief, p. 10), that "Petitioner continues to sell Sears, Roebuck", but that is solely because respondent thus far has been unsuccessful in its deliberate and brazen harassment and attempted intimidation.

The record of the earlier case further shows (p. 34) *by affidavit of respondent's counsel* that respondent's attorneys are under "unqualified" instructions to start suit against M. B. Austin. In the teeth of this affidavit, respondent makes the statement on page 9 of its brief:

> "Further, there is no circumstance in the present case to suggest the possibility that respondent will

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* Mr. Marks' letter, in its entirety, is reproduced on page 24 of the Transcript of Record before this Court in Case No. 1078, October Term 1941. The record filed with the present petition necessarily was limited to the printed record in the Court of Appeals below. By the rules of that Court only the portions of the record counsel desired the Court of Appeals to read are printed as an appendix to the briefs (see Rule 26(2)(e) of the rules of the United States Circuit Court of Appeals for the Third Circuit). Under these circumstances, the necessity as well as the propriety of referring this Court to the record in Case No. 1078 at the October Term 1941 is recognized by respondent in the footnote appearing on pages 4 and 5 of its brief. The record in that case was before this Court on petition for writ of certiorari by respondent, which was denied by this Court.

bring any additional actions against customers of petitioner."

Respondent couples with its assertion of no threat of multiplicity of suits the assertion that its conduct is proper because Sears is large. If petitioner does 95% of its business with two customers, then harassment of those two is more serious than the harassment of ninety-five customers, each doing 1% of the business. The loss of two large customers, under such circumstances, may be catastrophic; the loss of two small ones negligible. It is obvious that it is not the *number* of suits that supplies the yardstick for measuring "multiplicity".

Conclusion.

This Court has the power and the duty to prevent abuse of legal process. The facts of this case are plain. The questions here presented can arise only in interlocutory proceedings such as the present, because if undecided at this stage they cannot arise later. Action by this Court is therefore necessary *now*, and is most earnestly urged.

Respectfully submitted,

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